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# Apparently Not: The Status of Apparent Authority after *Holloway v. Shelter Mutual Insurance*

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Apparently Not: The Status of Apparent Authority  
after *Holloway v. Shelter Mutual Insurance*

TABLE OF CONTENTS

I. Introduction.....289

II. The Development of Apparent Authority in Louisiana.....291

    A. Apparent Authority Before January 1, 1998.....292

    B. La. Acts 1997, No. 261: Revision of the Articles On Mandate.....297

    C. Post-Revision Jurisprudence .....302

III. Holloway, in its Many Forms .....304

    A. Facts and Procedure .....305

    B. Line Upon Line: The Third Circuit Opinion.....307

    C. Article 2993: The Right Result for the Right Reason.....309

IV. A Case for Clarity .....310

V. Conclusion .....311

*“The decisions of the courts on economic and social questions depend on their economic and social philosophy.”<sup>1</sup>*

I. INTRODUCTION

Apparent authority is an ambiguous doctrine which endured an unnecessary and unfriendly discussion in the recent third circuit case, *Holloway v. Shelter Mutual Insurance*.<sup>2</sup> The Louisiana Legislature provided the third circuit with simple means of resolving the issues in *Holloway*, allowing an equitable and correct result without ever having to delve into the ambiguous apparent authority doctrine. But the third circuit did delve into apparent authority, and the ensuing discussion questioned even the doctrine’s continued existence.

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1. *Theodore Roosevelt*, Frost-Knappman and Schrager, Quotable Lawyer 69 (Rev’d ed. 1998).

2. *Holloway v. Shelter Mut. Ins. Co.*, 03-0896 (La. App. 3d Cir. 12/10/03), 861 So. 2d 763, writ denied, 04-0087 (La. 3/19/04), 869 So. 2d 854.

Apparent authority has long been recognized in Louisiana, and most of that recognition has been entirely jurisprudential. Prior to 1998 there were no code articles recognizing the doctrine, and some arguably disallowing it.<sup>3</sup> This did not prevent courts from recognizing the doctrine of apparent authority when they felt it appropriate; they simply ignored the applicable articles.<sup>4</sup>

On January 1, 1998, a set of new code articles dealing with mandate took effect, codifying Louisiana's jurisprudential stance on several issues, including apparent authority.<sup>5</sup> Subsequently, in December of 2003, the third circuit in *Holloway* stated that their reading of the revised code articles did not allow for the application of apparent authority.<sup>6</sup> The case involved a waiver of uninsured motorist (UM) coverage. Shelter Mutual insured Donnie Holloway, who purchased a car and subsequently told his agent he wished to waive UM coverage. Donnie also informed his agent that his mother would go to the agent's office to execute the waiver and all other insurance documents. Donnie was thereafter killed in a car accident involving an uninsured driver, and after Shelter Insurance denied payment on the UM coverage Donnie's children sued to collect the UM benefits.<sup>7</sup> Shelter Mutual filed a motion for summary judgment which could have been denied solely because Donnie's mother had no written authority to perform an act that required formalization by a writing. Instead the court, in reversing the summary judgment dismissal, took the liberty to discuss apparent authority as well.

When the third circuit, in *Holloway*, discussed apparent authority it looked to articles in Title XV of the Louisiana Civil Code so frequently ignored before the revision; seeing no precise statutory reproduction of the doctrine's jurisprudential standards, the court concluded it no longer existed.<sup>8</sup> The court turned a blind eye to a new and important article which allows apparent authority,

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3. Wendell H. Holmes & Symeon C. Symeonides, *Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law*, 73 Tul. L. Rev. 1087, 1151 (1999); La. Civ. Code art. 3010 (1870); *Interstate Electric v. Frank Adams Electric Co.*, 173 La. 103, 136 So. 283 (1931).

4. Holmes & Symeonides, *supra* note 3, at 1151.

5. 1997 La. Acts, No. 261, § 1. The revised articles do not include the words "agency" or "apparent authority," instead they contain words more representative of the civilian tradition, such as "representation" and "procurator." See discussion *infra* Part II. B.

6. *Holloway*, 861 So. 2d at 770.

7. See discussion *infra* Part III.A.

8. *Holloway*, 861 So. 2d at 770.

Louisiana Civil Code article 3021.<sup>9</sup> After all, a finding that apparent authority still exists and was applicable in *Holloway* could have produced the uncomfortable result of denying children insurance proceeds from their deceased father's insurer, and likely explains the court's selective application of the Civil Code articles on mandate.

Although in *Holloway* the third circuit refused to acknowledge the post-revision continuation of apparent authority, other circuits have continued to recognize the doctrine.<sup>10</sup> This conflicting stance between the circuits has increased both the ambiguity surrounding the apparent authority doctrine and the need for clarification of its current status.

Section II of this note discusses the background of apparent authority leading up to the *Holloway* decision, examines jurisprudence before and after the codal revision, and analyzes the revision itself. Section III examines *Holloway v. Shelter Mutual Insurance*, looking at procedural and background issues, an in depth analysis of the court's written reasons for judgment, other theories not raised by the parties, and the correct means provided for deciding this case. The necessity of apparent authority and what should be done to clarify the doctrine is laid out in Section IV, and Section V summarizes the current status of apparent authority. The sum of the Sections reveals that apparent authority remains a part of Louisiana law. It has been for years and is not as easily discarded as the *Holloway* case suggests.

## II. THE DEVELOPMENT OF APPARENT AUTHORITY IN LOUISIANA

When an agent binds his principal to a third person via power given to the agent by the principal, such is a demonstration of actual authority.<sup>11</sup> Actual authority arises from communications between principal and agent and is the most common type of authority in agency situations.<sup>12</sup> But it is not the only way an agent can bind her principal. Apparent authority is another way for an

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9. *Id.*

10. *Waffle House, Inc. v. Corporate Properties, Ltd.*, 99-2906 (La. App. 1st Cir. 2/16/01), 780 So. 2d 593; *American Zurich Ins. Co. v. Johnson*, 37,567 (La. App. 2d Cir. 1/30/03), 850 So. 2d 1112; *Where Angels Tread, Ltd. v. Dansby*, 37,689 (La. App. 2d Cir. 9/24/03), 855 So. 2d 906; *Tresch v. Kilgore*, 03-0035 (La. App. 1st Cir. 11/7/03), 868 So. 2d 91.

11. *Tedesco v. Gentry Dev., Inc.*, 540 So. 2d 960, 963 (La. 1989).

12. *Id.*

agency relationship to be established or continued.<sup>13</sup> This occurs when the agent is acting in excess, or absence, of any express authority, and is based on manifestations between the principal and third persons who contract with the agent.<sup>14</sup> This common law theory of apparent authority is based in contract and has developed over time into a well-established and significant doctrine within Louisiana law.<sup>15</sup> It was codified in 1997 and has been recognized jurisprudentially thereafter.<sup>16</sup>

### *A. Apparent Authority Before January 1, 1998*

Prior to January 1, 1998, apparent authority was a prevalent, yet uncoded doctrine in Louisiana.<sup>17</sup> This lack of legislation, however, did not diminish the importance of the doctrine in our jurisprudence. Indeed, Louisiana courts adopted this common law doctrine whenever they felt equity dictated its application despite code articles negating it.<sup>18</sup>

This application dates back to 1931 and the Louisiana Supreme Court case, *Interstate Electric Co. v. Frank Adam Electric Co.*<sup>19</sup> In that case the court outlined the basic premises on which apparent authority is established. The court declared limitations or restrictions on agents' powers inapplicable to third parties unknowing of those limitations or restrictions.<sup>20</sup> Instead, mutual

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13. Although referred to as "Apparent Authority," it is instead "power" and not authority at all. "Power" is the "legal ability by which a person may create, change or extinguish legal relations." "Authority" requires more than just "ability" but also some *licere* or appropriateness. Wolfram Muller-Freienfels, *The Law of Agency in Civil Law in the Modern World* 88 (A. N. Yiannopoulos ed., Louisiana State University Press 1965).

14. *Venable v. United States Fire Ins. Co.*, 02-505 (La. App. 3d Cir. 10/30/02), 829 So. 2d 1179, 1183. These manifestations need not be express; they can be implied through acts or omissions of the principal.

15. *Tedesco*, 540 So. 2d at 963-64.

16. La. Civ. Code art. 3021; see *Waffle House, Inc. v. Corporate Properties, Ltd.*, 99-2906 (La. App. 1st Cir. 2/16/01), 780 So. 2d 593, 597-98; *American Zurich Ins. Co. v. Johnson*, 37,567 (La. App. 2d Cir. 11/30/03), 850 So. 2d 1112; *Where Angels Tread, Ltd. v. Dansby*, 37,489 (La. App. 2d Cir. 9/24/03), 855 So. 2d 906; *Tresch v. Kilgore*, 03-0035 (La. App. 1st Cir. 11/7/03), 868 So. 2d 91.

17. Muller-Freienfels, *supra* note 13, at 88.

18. *Holmes & Symeonides*, *supra* note 3, at 1151-52; La. Civ. Code art. 3010 (1870).

19. 173 La. 103, 136 So. 283 (1931).

20. *Id.* at 109, 136 So. at 285.

rights and liabilities are “governed by the apparent scope of the agent’s authority, which is that authority the principal holds the agent out as possessing or which he permits the agent to represent that he possesses and which the principal is estopped to deny.”<sup>21</sup> This case demonstrated that apparent authority is created by the manifestations of the principal to the third person, not between the agent and principal, or the agent and third person.<sup>22</sup> *Interstate Electric* was an early recognition of apparent authority. It established the basic premises for application of the doctrine, and said its absence would allow principals to “commit a fraud upon innocent persons.”<sup>23</sup> *Interstate Electric* continued to be the standard on apparent authority for more than fifty years.<sup>24</sup>

Later, in *Boulos v. Morrison*, the Louisiana Supreme Court revisited apparent authority and interjected a requirement of reasonable reliance.<sup>25</sup> While reaffirming the first requirement for apparent authority, a principal’s manifestation to an innocent third party, the court declared, “a third party seeking to benefit from the doctrine of apparent authority may not blindly rely upon the assertions of the agent. He has a duty to inquire into the nature and extent of the agent’s power.”<sup>26</sup> This statement may be a reflection of the case and the unreasonable reliance it involved.<sup>27</sup> While

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21. *Id.*

22. *Id.* The court mentioned the mutual rights and liabilities, alluding that the doctrine is born out of contract, thus creating rights of enforcement both ways between principals and third persons. But this is not immediately clear as the court used the language, “estopped to deny.” This is confusing because the doctrines of apparent authority and agency by estoppel differ; fortunately they are later explained by the court in *Tedesco v. Gentry*, 540 So. 2d 960, 964 (La. 1989).

23. 173 La. at 109, 136 So. at 285.

24. *Tedesco*, 540 So. 2d at 963 (surmising that *Interstate Electric* is the leading case in Louisiana at the time of the *Tedesco* opinion, in 1989, fifty-eight years after *Interstate Electric*).

25. 503 So. 2d 1, 3 (La. 1987).

26. *Id.*

27. *Id.* at 4. The reliance in *Boulos* was by two “apparently sophisticated business persons” who handed \$8,250 over to a man named Mike they had recently met at an electronics retail store, relying only on his statement that he would obtain and deliver merchandise and an undated receipt he gave them signed “M.” Plaintiffs alleged that Mike was defendant shop owner’s agent because defendant paid Mike a finder’s fee for bringing customers to the shop. However, Mike acted in a way that far exceeded any actual authority given to him by the store’s owner. The court said the “facts and circumstances should have caused plaintiffs . . . to question Mike’s authority and good faith.”

more prominent, *Boulos* was not the first case to incorporate the requirement of reasonableness. Several appellate decisions preceding *Boulos* required reasonableness, and like *Boulos*, called apparent authority an estoppel doctrine.<sup>28</sup> This indicated either a merger, or some courts' confusion, of the two different doctrines.

In *Tedesco* the supreme court remedied this possible confusion with a thorough discussion of apparent authority that explained the difference between agency by estoppel and apparent authority.<sup>29</sup> The court pointed out that Louisiana decisions have often used estoppel language when discussing apparent authority, and such usage is incorrect.<sup>30</sup>

The *Tedesco* court explained that apparent authority is a doctrine arising from the objective theory of contracts, and thus produces rights and obligations reciprocally between principals and third persons.<sup>31</sup> In theory, a principal may enforce a contract formed via the agent's apparent authority as easily as the third person. Additionally, reasonable reliance contains both a subjective and objective element. But it does not require a change in position for a valid contract to be formed. This is how agency by estoppel differs from apparent authority. Agency by estoppel requires that the innocent third party suffer a change in position, which follows logically since estoppel arises from tort principles and is aimed at preventing loss.<sup>32</sup> Hence, the difference between apparent authority and agency by estoppel is that the former creates a contract when the principal either expressly or implicitly manifests to the third person, or community of which the third person is a member, that the agent has certain authorizations, and the third person *reasonably relies* on the manifestation. The latter creates a delictual action for damages whenever the third person can show a change of position resulting from some *fault* of the principal.<sup>33</sup> Although agency by estoppel and apparent authority

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28. See *Southwest Motors Leasing, Inc. v. Matthews Lumber Co. of Mansfield*, 325 So. 2d 870, 873 (La. App. 2d Cir. 1976); *Bamber Contractors, Inc. v. Morrison Engineering & Contracting Co.*, 385 So. 2d 327, 330 (La. App. 1st Cir. 1980); *Byles Welding & Tractor, Inc. v. McDaniel*, 441 So. 2d 48, 49-50 (La. App. 3d Cir. 1983); *CNA Ins. Corp. v. Nuton Corp.*, 461 So. 2d 518, 521 (La. App. 3d Cir. 1984); *Reeves v. Celestron, Inc.*, 473 So. 2d 397, 398-99 (La. App. 3d Cir. 1985), *writ not considered*, 477 So. 2d 698 (La. 1985).

29. 540 So. 2d 960, 964 (La. 1989).

30. *Id.*

31. *Id.*

32. *Id.*

33. A change of position can be payment of money, expending labor, suffering loss, or legal exposure. *Id.* at 965.

seem to collide in most situations, apparent authority is necessary for innocent third parties who have relied on the principal's manifestations and are not able to show a change of position. Recognition of agency by estoppel only would preclude, in a number of such instances, the enforcement of the innocent third party's rights.<sup>34</sup>

Another major development in *Tedesco* was the introduction of the "equal dignities" doctrine into Louisiana jurisprudence. *Tedesco* dealt with the agent's ability to alienate immovable property. The court said an agent could not sell immovable property without written authority because a writing was required to execute the contract of sale.<sup>35</sup> This went to the heart of reasonable reliance, as the court held a third person's reliance on a principal's oral representation to the third person unreasonable if the act in question required formalization through a writing. The equal dignities doctrine does not, however, preclude an estoppel claim if the third person can show a change of position.<sup>36</sup>

*Tedesco* continues to be the leading case in most circuits. There have been later supreme court cases on apparent authority, but none has laid out quite the explanation as *Tedesco*. One example is *Independent Fire Insurance Company v. Able Moving and Storage Company, Inc.*<sup>37</sup> Here the Louisiana Supreme Court fell back into the habit of referring to the doctrine as an estoppel principle and mistakenly stated that apparent authority requires detrimental reliance as opposed to reasonable reliance, which is the standard from previous cases.<sup>38</sup> This analysis is likely a result of the case facts revealing a change of position as a result of the third party's reliance, and the more appropriate theory to apply would have been agency by estoppel.<sup>39</sup> While courts have cited

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34. *Id.* at 964.

35. *Id.*

36. *Id.*

37. 94-1982 (La. 2/20/95), 650 So. 2d 750.

38. *Id.* at 752; *Boulos v. Morrison*, 503 So. 2d 1, 3 (La. 1987).

39. In *Independent Fire*, 650 So.2d at 751, plaintiff relied on manifestations by Bekins Van Lines in a phone book advertisement, and on the side of Able Movers' Trucks, that Able Movers was an agent of Bekins. Plaintiff relied on the "care or skill" of Bekins' good name when employing Able Movers. Able Movers' employees caused a fire that damaged some of plaintiff's property, thus causing a detrimental change in position based on her reliance. This case demonstrates the potential overlap in the doctrines of estoppel and apparent authority. The court in *Tedesco*, 540 So. 2d at 965, referred to the "estoppel theory of apparent authority" even after they explained the difference between



*Independent Fire*, and there is no clear adoption of one case over the other, *Tedesco* represents the correct interpretation of the apparent authority doctrine before the 1997 revision, and thereafter.<sup>40</sup>

Pre-revision cases applying apparent authority did so without codal guidance, and in spite of a code article precluding the doctrine.<sup>41</sup> Most courts dealing with apparent authority ignored the old Louisiana Civil Code article 3010. Others cited it, but never gave it much discourse or application other than discussing ratification.<sup>42</sup> Full discussion of Louisiana Civil Code article 3010 in a case holding for the application of apparent authority would have been difficult since it declared an agent's acts exceeding his power "null and void with regard to the principal, unless ratified by the latter."<sup>43</sup> The only arguable way to apply both this article and apparent authority was to label the principal's manifestations to the third party a pre-emptive ratification of an agent's subsequent acts, which would have been impossible since ratification requires a previous act.<sup>44</sup> No other argument was offered in pre-revision cases to circumvent the "null and void" language in the old article

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estoppel and apparent authority, inferring that even when referred to in this sense it is still apparent authority as described in the case.

40. Cases following *Independent Fire*: *Stevenson v. Pepsico, Inc.*, No. 97-2806, 1999 WL 58811 (E.D. La. Feb. 1, 1999); *Waffle House, Inc. v. Corporate Properties, Ltd.*, 99-2906 (La. App. 1st Cir. 2/16/01), 780 So. 2d 593, 597; *Clampit v. Interstate Dodge, Inc.*, 34,125 (La. App. 2d Cir. 11/15/00), 771 So. 2d 311, 315.

Cases following *Tedesco*: *Holloway v. Shelter Mut. Ins. Co.*, 03-0896 (La. App. 3d Cir. 12/10/03), 861 So. 2d 763, 769, *writ denied*, 04-0087 (La. 3/19/04), 869 So. 2d 854; *Where Angels Tread, Ltd. v. Dansby*, 37,689 (La. App. 2d Cir. 9/24/03), 855 So. 2d 906, 909; *Gulf Production Co. v. Schlumberger Well Services, Nos. 94-0236, 94-237*, 1995 WL 83628 (E.D. La. Feb. 24, 1995).

41. *Holmes & Symeonides, supra* note 3, at 1146. La. Civ. Code art. 3010 (1870) stated: "The attorney can not go beyond the limits of his procuration; whatever he does exceeding his power is null and void with regard to the principal, unless ratified by the latter, and the attorney is alone bound by it in his individual capacity."

42. *Tedesco v. Gentry*, 521 So. 2d 717, 724 (La. App. 2d Cir. 1988); *Bamber Contractors, Inc. v. Morrison Engineering and Contracting Co.*, 385 So. 2d 327, 331 (La. App. 1st Cir. 1980); *Duplessis Cadillac, Inc. v. Creative Credit Servs., Inc.*, 564 So. 2d 336, 339 (La. App. 1st Cir. 1990).

43. La. Civ. Code art. 3010 (1870).

44. Ratification is the "confirmation and acceptance of a previous act . . . ." Black's Law Dictionary 1268 (7th ed. 1999).

3010. Instead courts concede apparent authority was not derived from statutory or codal authority, but introduced and developed into Louisiana law jurisprudentially.<sup>45</sup>

*B. La. Acts 1997, No. 261: Revision of the Articles on Mandate*

La. Acts 1997, No. 261 represent an overhaul of Title XV, Book III—part of an ongoing revision of the Louisiana Civil Code.<sup>46</sup> The Act, signed into law in June 1997, took effect on January 1, 1998. The revision changed the name of Title XV from *Of Mandate* to *Representation and Mandate*, and shortened the title by two articles.<sup>47</sup>

The Act was presented on recommendation of the Louisiana State Law Institute as House Bill 716, and went through committee on Civil Law and Procedure, the House, and the Senate without amendment or a single opposition vote.<sup>48</sup> It was drafted by Professor A. N. Yiannopoulos, who served as the Institute's reporter on the project.<sup>49</sup> The purpose of the revision was to incorporate into Louisiana's Civil Code several common law notions of agency already recognized in Louisiana jurisprudence. The word "agency" is never found in the revised title due to possible confusion with other common law notions, and the desire to incorporate these common law doctrines into our civilian tradition using civilian terms.<sup>50</sup> The stated purpose of the new title is to define mandate and modernize the basic principles of prior law, highlight the distinctions between relationships involving mandatary and principal and those involving third persons, and establish matters on terminating the mandate and mandatary's powers.<sup>51</sup> Whether these objectives have been realized is still under debate.

One clear objective of the revision was realized in Louisiana Civil Code article 2993. This article codified the "equal dignities" doctrine set forth in *Tedesco*.<sup>52</sup> Although the comments to this

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45. *Boulos v. Morrison*, 503 So. 2d 1, 3 (La. 1987); *Tedesco*, 540 So. 2d 963; *Casten v. Cordell*, 26,487 (La. App. 2d Cir. 1/25/95), 649 So. 2d 123, 127; *Bamber Contractors*, 385 So. 2d at 330.

46. *Holmes & Symeonides*, *supra* note 3, at 1089.

47. 1997 La. Acts No. 261.

48. Louisiana Legislative Calendar, 23rd Reg. Session 1997, Vol. 1, 254 (1997).

49. *Holmes & Symeonides*, *supra* note 3, at 1089.

50. La. Acts 1997, No. 261, expose des Motifs.

51. *Id.*

52. See *Tedesco* discussion *supra* Part II.A.

article state that it only reproduces prior Article 2992, this is an understatement.<sup>53</sup> The first sentence of the article states concisely what the entire article previously declared; mandate is not required to be in any particular form.<sup>54</sup> However, the second half of the article adopts *Tedesco's* equal dignities requirement by stating, "when the law prescribes a certain form for an act, a mandate authorizing the act must be in that form."<sup>55</sup> The comments explain that when any act such as a donation *inter vivos* or a compromise, requires an authentic or written form, a contract of mandate giving authority to do these acts must also be in authentic or written form.<sup>56</sup> Courts, including the third circuit, have had little trouble recognizing the applicability of this new article.<sup>57</sup>

Louisiana Civil Code article 3010 is relevant to discussion of apparent authority not so much for what it is, but for what it used to be.<sup>58</sup> Pre-revision, this article seemingly negated any possibility of apparent authority.<sup>59</sup> This article, which eliminated any consequences to principals for mandatary's acts which exceed their authority and went un-ratified by the principal, has been revised. It was replaced by a new provision based on pre-revision Article 3021, and Quebec Civil Code Article 2152.<sup>60</sup> These source articles, and the new Louisiana Civil Code article 3010, contain affirmative duties of the principal regarding his mandatary.<sup>61</sup> Instead of eliminating all duties of a principal with regard to his

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53. La. Civ. Code art. 2993 cmt (a); Holmes & Symeonides, *supra* note 3, at 1122.

54. La. Civ. Code art. 2993. See *Tedesco* discussion *supra* Part II.A.

55. La. Civ. Code art. 2993.

56. *Id.* cmt (c).

57. *Holloway v. Shelter Mut.*, 03-0896 (La. App. 3d Cir. 12/10/03), 861 So. 2d 763, 767, *writ denied*, 04-0087 (La. 3/19/04), 869 So. 2d 854; *Cardinale v. Stanga*, 01-1443 (La. App. 1st Cir. 09/27/02), 835 So. 2d 576, 579; *Reinhardt v. Reinhardt*, 31,174 (La. App. 2d Cir. 01/20/99), 728 So. 2d 503, 510, *writ granted*, 99-0723 (La. 10/19/99), 748 So. 2d 423 (reversed on other grounds).

58. La. Civ. Code art. 3010 (1870).

59. Holmes & Symeonides, *supra* note 3, at 1146.

60. La. Civ. Code art. 3010 cmt (a). Article 2152 of the Civil Code of Quebec states: "The mandator is bound to discharge the mandatary from the obligations he has contracted towards third persons within the limits of the mandate. The mandator is not liable to the mandatary for any act which exceeds the limits of the mandate. He is fully liable, however, if he ratifies such act or if the mandatary, at the time he acted, was unaware that the mandate had terminated."

61. La. Civ. Code art. 3010; La. Civ. Code art. 3021 (1870); Civ. Code of Quebec art. 2152.

mandatary's unauthorized acts, this new article creates certain affirmative duties towards the principal, without terminating all others.<sup>62</sup> What was a frequently overlooked barrier to apparent authority is no longer a barrier at all.

The second article in the title, Louisiana Civil Code article 2986, discusses the authority of the representative and how it can be conferred. Although there was a previous Article 2986, this article, like many revised articles on mandate, is labeled "new."<sup>63</sup> Article 2986 is the third circuit's source for determining that apparent authority may no longer exist in Louisiana.<sup>64</sup> Little explanation as to why this article precludes apparent authority accompanied the third circuit's recital of it. Instead, the third circuit recognized the recent revision, reproduced the article and comments in the opinion, and continued by saying their reading of the Civil Code post-revision precludes the application of apparent authority.<sup>65</sup> The article says, "The authority of the representative may be conferred by law, by contract, such as mandate or partnership, or by the unilateral juridical act of procuration."<sup>66</sup> The third circuit may have assumed this new article to be an exhaustive list of ways to confer representation because it did not contain the traditional "buzz words" reflecting apparent authority. Even if the third circuit was correct and the list was exhaustive, it overlooked one important article. Louisiana Civil Code article 3021 provides for apparent authority whether the list in article 2986 is exhaustive or illustrative.

Louisiana Civil Code article 3021, *Putative Mandatary*, is now the most important article regarding apparent authority. This article codifies the other half of *Tedesco*.<sup>67</sup> It reads, "One who causes a third person to believe that another person is his mandatary is bound to the third person who in good faith contracts with the putative mandatary."<sup>68</sup> This article certainly reads as if it provides for apparent authority.

Louisiana Civil Code article 3021 is new, and is based on Quebec Civil Code article 2163.<sup>69</sup> While the article codifies

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62. 1997 La. Acts No. 261, § 1.

63. La. Civ. Code art. 2986 (1998).

64. *Holloway v. Shelter Mut. Ins.*, 03-0896, (La. App. 3d Cir. 12/10/03), 861 So. 2d 763, 770, *writ denied*, 04-0087 (La. 3/19/04), 869 So. 2d 854.

65. *Id.*

66. La. Civ. Code art. 2986.

67. 540 So. 2d 960 (La. 1989).

68. La. Civ. Code art. 3021.

69. *Id.* at cmt (a); Quebec Civ. Code art. 2163: "A person who has allowed it to be believed that a person was his mandatary is liable, as if he were his

apparent authority, its wording raises some questions.<sup>70</sup> Pre-revision jurisprudence incorporated *reasonable reliance* into the elements for apparent authority.<sup>71</sup> Louisiana Civil Code article 3021 inserts only a "good faith" requirement. Unreasonable beliefs, or unreasonable reliance on a principal's manifestations were not enough to bind principals when the requirement was reasonable reliance.<sup>72</sup> However, when all that is required is "good faith" this reasonableness requirement may be dismissed.<sup>73</sup>

The definition of "good faith" itself is not completely clear. Neither the Louisiana Legislature nor the Law Institute clarify whether "good faith" in this article is to be entirely subjective or to contain some objective component. Within the Civil Code there are two different definitions of "good faith."<sup>74</sup> The first is found in Louisiana Civil Code article 487 and only requires satisfaction of a subjective element.<sup>75</sup> The other, more recent, definition is in Louisiana Civil Code article 3480, and it interjects the requirement of reasonableness.<sup>76</sup> Although the former definition relates to accession and the latter to acquisitive prescription, strong policy reasons suggest the latter should be used when applying Louisiana Civil Code article 3021. Professors Holmes and Symeonides offer some of those reasons: the relative newness of the objective definition over the subjective one, pre-revision jurisprudence that

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mandatary, to the third person who has contracted in good faith with the latter, unless, in circumstances in which the error was foreseeable, he has taken appropriate measures to prevent it."

70. Holmes & Symeonides, *supra* note 3.

71. Boulos v. Morrison, 503 So. 2d 1, 3 (La. 1987); *Tedesco*, 540 So. 2d at 964.

72. Boulos, 503 So. 2d at 3.

73. Holmes & Symeonides, *supra* note 3, at 1153-54.

74. *Id.*

75. La. Civ. Code art. 487: "For purposes of accession, a possessor is in good faith when he possesses by virtue of an act translatif of ownership and does not know of any defects in his ownership. He ceases to be in good faith when these defects are made known to him or an action is instituted against him by the owner for the recovery of the thing." Comment (d) goes on to say, "The possessor . . . is not required to prove his good faith, because good faith is presumed."

76. La. Civ. Code art. 3480: "For purposes of acquisitive prescription, a possessor is in good faith when he reasonably believes, in light of objective considerations, that he is the owner of the thing he possesses." Comment (c) of this article further expounds on the reasonableness requirement.

required the objective definition, and the numerous common law states which apply the objective test in this context.<sup>77</sup>

While the Louisiana Legislature and Law Institute do not expressly declare which standard should be used to express good faith, they do provide guidance on the purpose of Louisiana Civil Code article 3021. While still in the hands of the Louisiana Law Institute this article was up for discussion at a Council meeting. In the discussion a Council member asked the Reporter, Professor Yiannopoulos, if this article provided for "apparent agency." Professor Yiannopoulos replied, "Yes." The Institute subsequently adopted the article.<sup>78</sup> Given the smooth passage of Bill 716 through the Committee on Civil Law and Procedure, and unopposed ratification in the House and Senate, it is easy to surmise that the legislature adopted the intent of the Law Institute along with the articles.<sup>79</sup>

The elimination of two articles in Title XV arises from the language in Louisiana Civil Code article 2990. This new article declares the rules governing obligations to also be applicable to mandate unless expressly stated otherwise in Title XV.<sup>80</sup> This codal efficiency eliminated the substance of prior articles 2985 and 3034, and post-revision articles 3033 and 3034 were left blank as a result.<sup>81</sup> Louisiana Civil Code article 3021 provides for apparent authority, and nothing in Title XV suggests it should not be governed by the articles governing obligations.<sup>82</sup> This reaffirms the proclamation in *Tedesco* that apparent authority is based in contract law, not estoppel.

The 1997 revision of Title XV served more purposes than mentioned in this note. When discussing the status of apparent authority these changes are the relevant ones. The revision attempted to create a clearer, more efficient Title XV, which incorporated notions of common law agency, codified established

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77. Holmes & Symeonides, *supra* note 3, at 1154.

78. Louisiana Law Institute, Minutes of the Meeting of the Council, p. 9 (Sept. 15-16, 1995). The Law Institute, after this question, substituted into the article the word "causes" to replace "allows" after criticism by one member of the usage of "causes" and the recommendation by the reporter of the word "allows."

79. Louisiana Legislative Calendar, 23rd Reg. Session 1997, Vol. 1, 254 (1997).

80. 1997 La. Acts No. 261, § 1.

81. La. Civ. Code arts. 3033-34; La. Acts 1997, No. 261, expose des Motifs.

82. See *Tedesco* discussion *supra* at Section II.A.

jurisprudential standards, and attached civil law terms to both.<sup>83</sup> For most, the revision has served this purpose, codifying both the equal dignities doctrine and apparent authority in the process. Nevertheless, not all circuits agree.

### C. *Post-Revision Jurisprudence*

Other than *Holloway*, jurisprudence after the 1997 revision has recognized and applied apparent authority the same as before. As the third circuit pointed out in *Holloway*, there have been no post-revision Louisiana Supreme Court cases discussing apparent authority.<sup>84</sup> Still, there have been appellate decisions recognizing the doctrine, including from the third circuit.<sup>85</sup> Some of these appellate decisions apply apparent authority by citing the new Louisiana Civil Code article 3021, *Putative Mandatary*—the same article ignored by the third circuit in *Holloway*.<sup>86</sup>

Jurisprudence regarding apparent authority in the first, second, and fifth circuits has been much the same as before the revision. When discussing apparent authority, applying it or not, the circuit courts looked to leading pre-revision cases to establish how the doctrine should be applied.<sup>87</sup> One even cited a third circuit case for authority.<sup>88</sup>

Some of the more recent decisions go further and recognize Louisiana Civil Code article 3021 as the codification of apparent authority. The second circuit twice began a case discussion of apparent authority by citing Louisiana Civil Code article 3021, immediately followed in one instance by reference to a leading

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83. La. Civ. Code Title XV; La. Acts 1997, No. 261, expose des Motifs.

84. *Holloway v. Shelter Mut. Ins.*, 03-0896 (La. App. 3d Cir. 12/10/03), 861 So. 2d 763, 769–770, *writ denied*, 04-0087 (La. 3/19/04), 869 So. 2d 854.

85. *Id.* at 770.

86. *Waffle House, Inc. v. Corporate Properties, Ltd.*, 99-2906 (La. App. 1st Cir. 2/16/01), 780 So. 2d 593, 596 n.3; *American Zurich Ins. Co. v. Johnson*, 37,567 (La. App. 2d Cir. 7/30/03), 850 So. 2d 1112, 1114; *Where Angels Tread, Ltd. v. Dansby*, 37,689 (La. App. 2d Cir. 9/24/03), 855 So. 2d 906, 911; *Tresch v. Kilgore*, 03-0035 (La. App. 1st Cir. 11/7/03), 868 So. 2d 91, 94–95.

87. *Service Steel and Pipe, Inc. v. Guinn's Trailer Sales, Inc.*, 37,291 (La. App. 2d Cir. 6/25/03), 850 So. 2d 902, 908; *Bridges v. X Comm'ns, Inc.*, 03-441 (La. App. 5th Cir. 11/12/03), 861 So. 2d 592, 597, *writ denied*, 03-3431 (La. 2004), 861 So. 2d 592.

88. *American Zurich Ins.*, 850 So. 2d at 1116 (citing *McManus v. Southern United Fire Ins.*, 00-1456 (La. App. 3d Cir. 3/21/01), 801 So. 2d 392) (discussing putative mandate).

pre-revision supreme court case. Both cases offered a recital of traditional apparent authority doctrine.<sup>89</sup>

The first circuit too has recognized the applicability of the new Louisiana Civil Code article 3021, but with hesitance. *Waffle House, Inc. v. Corporate Properties, Ltd.* dealt with facts that transpired before the revision, but still the first circuit seemed impressed to recognize the recent codification of apparent authority.<sup>90</sup> The first circuit claimed, "Louisiana's law concerning apparent authority appears to have been well developed at the time of the mistaken payments at issue."<sup>91</sup> It then immediately inserted a footnote discussing the subsequent revision and enactment of Louisiana Civil Code article 3021, implying its belief that said article codified apparent authority.<sup>92</sup> Then, in *Tresch v. Kilgore* the first circuit recited Louisiana Civil Code article 3021 and declared, "The pre-1997 judicial understanding of the principles of apparent authority appears analogous."<sup>93</sup> But this was coupled with a footnote disavowing any attempt to interpret the revision as an amendment or codification of apparent authority.<sup>94</sup> Nonetheless, the first circuit did acknowledge the article's applicability and did not question the continued existence of the apparent authority doctrine in Louisiana.

The third circuit has also issued post-revision opinions recognizing apparent authority.<sup>95</sup> The earliest, *McManus v. Southern United Fire Insurance*, seems to be a leading post-revision case.<sup>96</sup> The opinion was issued in March 2001, and gave a well-developed explanation of apparent authority that has been referenced by other cases discussing the doctrine.<sup>97</sup> This is misleading because the events in the case took place prior to January 1, 1998.<sup>98</sup> Hence *McManus* is a pre-revision case on

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89. *Id.* at 1114–15; *Where Angels Tread, Ltd.*, 855 So. 2d at 911.

90. *Waffle House, Inc.*, 780 So. 2d at 597–598.

91. *Id.* at 596.

92. *Id.* at 597.

93. *Tresch v. Kilgore*, 03-0035 (La. App. 1st Cir. 11/7/03), 868 So. 2d 91, 94–95.

94. *Id.*

95. See *McManus v. Southern United Fire Ins.*, 00-1456 (La. App. 3d Cir. 3/21/01), 801 So. 2d 392; *F. Miller & Sons, Inc. v. Calcasieu Parish Sch. Bd.*, 02-00016 (La. App. 3d Cir. 5/15/02), 817 So. 2d 1261; *Venable v. U.S. Fire Ins. Co.*, 02-505 (La. App. 3d Cir. 10/30/02), 829 So. 2d 1179.

96. 801 So. 2d 392.

97. *Id.*

98. *Id.* The opinion issued by the appeals court did not list any dates relating to the occurrence of the events. *McManus* dealt with an insurance



apparent authority. The dates are inconsequential if apparent authority survived the revision unchanged, but the case could be completely dismissible if the third circuit is correct in their assertion that apparent authority may not have survived the revision.

There are, however, third circuit cases that recognize apparent authority where the events occur post-revision. In *Venable v. United States Fire Insurance Company* the facts giving rise to the action took place in 1999.<sup>99</sup> Here, the third circuit discussed apparent authority without questioning its existence, citing several leading pre-revision cases, including their own summary in *McManus*.<sup>100</sup> *Venable* is not the only post-revision third circuit case that recognized apparent authority and used *McManus* for authority.<sup>101</sup>

Jurisprudential application of apparent authority in light of the 1997 revision has been largely unchanged. The discussion and names have varied with the introduction of new code articles, but little else has changed. Overall, the revision was effective in codifying well-established jurisprudential doctrines. *Holloway* remains noted as a large exception to these statements.

### III. *HOLLOWAY*, IN ITS MANY FORMS

After jurisprudentially establishing apparent authority, codifying it in 1997, and continuing to recognize it post-revision, it seemed this doctrine was firmly rooted in Louisiana law. Thus, a case calling into question not only the applicability of apparent authority, but the doctrines continued existence, will tend to create confusion. When the third circuit stated that the Civil Code as currently written precludes the application of apparent authority in

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waiver like *Holloway*, however the wreck giving rise to the cause of action occurred in December of 1997, with the waiver occurring prior to that, both dates before the revision took effect.

99. 829 So. 2d at 1180-81.

100. *Id.* at 1182.

101. See *F. Miller & Sons, Inc. v. Calcasieu Parish Sch. Bd.*, 02-00016 (La. App. 3d Cir. 5/15/02), 817 So. 2d 1261, 1264. Another recent third circuit case on apparent authority, *Winters v. Dodson*, addressed apparent authority, but does not mention the revision, or the court's recent dismissal of apparent authority in *Holloway*. Instead, the court cited a pre-revision case as if it were the most recent pronouncement on the doctrine, again declaring apparent authority to be a "judicially created estoppel doctrine." 04-665 (La. App. 3 Cir. 12/15/04), 896 So. 2d 121, writ denied, 05-0121 (La. 4/1/05), 897 So. 2d 603.

the *Holloway* case, and then discarded the doctrine, it caused some concern.<sup>102</sup> When the Louisiana Supreme Court denied writs in the case, concern became confusion.<sup>103</sup>

### *A. Facts and Procedure*

*Holloway* dealt with an attempted waiver of UM coverage by an absent insured. On July 31, 2000 Donnie Holloway, a Forest Hill resident working in New Orleans, purchased a 1985 Mercury Cougar from a New Orleans dealer.<sup>104</sup> While at the dealership Donnie called his insurer in Alexandria, Louisiana, Shelter Insurance agent Bennie Poe, and requested the new automobile be added to his existing policy. Mr. Poe informed Donnie that he would need to come sign the necessary paperwork within thirty days. Donnie replied he may not be able to come by within that time frame, and if possible he would send his mother, Janet Holloway, to handle the paperwork. Testimony of Mr. Poe is that he consented to Janet signing the paperwork because he thought her to be a named insured under the policy.<sup>105</sup> During the initial conversation between Donnie and Mr. Poe, Donnie expressed his wish to not carry UM insurance on the Cougar.<sup>106</sup>

On August 16, 2000 Mrs. Holloway went to Mr. Poe's office and executed the documents necessary to effect coverage on the new vehicle. There was no conversation regarding the UM waiver. Mrs. Holloway was told the coverage was the same as the prior vehicle and was instructed where she should sign. Mr. Poe and his assistant, Charlotte Poe, were familiar with Mrs. Holloway because she herself carried insurance with Mr. Poe since 1990 and had also

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102. *Holloway v. Shelter Mut. Ins. Co.*, 03-0896, (La. App. 3d Cir. 12/10/03), 861 So. 2d 763, 770, *writ denied*, 04-0087 (La. 3/19/04), 869 So. 2d 854.

103. *Id.*

104. Although the third circuit opinion states the car was purchased in September, 2000, depositions of both Mr. Poe and Mrs. Holloway revealed this was a mistake. Deposition of Bennie Poe at p. 18, *Holloway v. Shelter Mut. Ins. Co.*, 208, 057 (9th Judicial District, Parish of Rapides); Deposition of Janet Holloway at p. 13-14, *Holloway v. Shelter Mut. Ins. Co.*, 208,057 (9th Judicial District, Parish of Rapides).

105. Deposition of Bennie Poe at p. 34, *Holloway v. Shelter Mut. Ins. Co.*, 208,057 (9th Judicial District, Parish of Rapides). This does not explain why Mrs. Holloway signed Donnie's name and not her own.

106. *Id.* at p. 19-22; Affidavit of Bennie Poe at ¶ 7, *Holloway v. Shelter Mut. Ins. Co.*, 208,057 (9th Judicial District, Parish of Rapides).

paid Donnie's premiums many times over the years.<sup>107</sup> It was a regular practice for Mrs. Holloway to run errands for Donnie, as he lived with her from the time he separated from his wife in 1994 until his death. But Mrs. Holloway had not, prior to August 16, 2000, executed any documents with Mr. Poe on behalf of Donnie Holloway.<sup>108</sup>

On March 26, 2001 Mr. Holloway was killed in a two-car accident when a minor driver attempting to pass in a no passing zone collided head-on into Mr. Holloway's Cougar. Consequently, Mr. Holloway's three children settled with the minor driver's insurance company for his policy limits of \$25,000 and filed suit against Shelter Insurance for the excess of damages over what the at-fault driver's policy provided, claiming initially that the insurance waiver was forged and therefore null.<sup>109</sup>

Plaintiffs filed suit in the Ninth Judicial District Court in Rapides Parish, and defendant answered with a request for summary judgment and dismissal which was granted.<sup>110</sup> The district court in the written reasons for judgment cited several reasons for finding the waiver valid, but nowhere mentioned apparent authority, Louisiana Civil Code articles 3021, or 2993.<sup>111</sup> Although the court stated that Mr. Holloway gave Janet Holloway implied authority to effect the waiver, implied authority arises from authority given in an actual agency situation, and is quite different from apparent authority.<sup>112</sup>

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107. Deposition of Janet Holloway at p. 11, *Holloway v. Shelter Mut. Ins. Co.*, 208,057 (9th Judicial District, Parish of Rapides); Deposition of Bennie Poe at pp. 24-26, *Holloway v. Shelter Mut. Ins. Co.*, 208,057 (9th Judicial District, Parish of Rapides).

108. Deposition of Janet Holloway at p. 12, *Holloway v. Shelter Mut. Ins. Co.*, 208,057 (9th Judicial District, Parish of Rapides); Deposition of Bennie Poe at pp. 14, 32, *Holloway v. Shelter Mut. Ins. Co.*, 208,057 (9th Judicial District, Parish of Rapides).

109. Plaintiff's Petition for Damages at ¶ 8, *Holloway v. Shelter Mut. Ins. Co.*, 208,057 (9th Judicial District, Parish of Rapides).

110. Written Reasons for Judgment, *Holloway v. Shelter Mut. Ins. Co.*, 208,057 (9th Judicial District, Parish of Rapides).

111. *Id.* The sixteen year relationship between Mr. Holloway and Mr. Poe's agency, the fact that Mr. Holloway has never carried UM coverage with Mr. Poe, and his verbal expression that he did not want such coverage and would have his mother take care of the paperwork at the insurance office were the primary reasons for the district court's findings.

112. *Id.* Implied authority differs from apparent authority in that it is derived from manifestations between the principal and agent, and arises from the agent's actual authority. It is the tangential authority accompanying the agent's actual

Plaintiffs appealed, surrendering their assertion of forgery to one of nullity under Louisiana Civil Code article 2993. Plaintiffs averred that because Louisiana Revised Statutes § 22:1406(D)(1)(a)(ii) required the waiver be signed by the named insured, and because Mrs. Holloway did not have written authority to act for Mr. Holloway, according to article 2993 she had no authority at all.<sup>113</sup> They also cited factual differences in Mrs. Holloway's and Mr. Poe's affidavits and depositions as other grounds for reversal of the summary judgment dismissal.<sup>114</sup>

### *B. Line Upon Line: The Third Circuit Opinion*

Perhaps the most intriguing part of the apparent authority discussion in the *Holloway* opinion is the author. Judge Marc T. Amy, who wrote the opinion, was also a member of the committee that revised the Title XV articles on mandate and was listed as present on the day that Louisiana Civil Code article 3021 was adopted by the Louisiana Law Institute, the same day Yiannopoulos affirmed that the article was meant to provide for "apparent agency."<sup>115</sup> It is interesting that Judge Amy would discuss apparent authority, positively or negatively, without mentioning the article that provides for it and which was created by a committee he sat on.

The third circuit opinion in *Holloway* struck a blow to the heart of apparent authority, but did not require the entire opinion to do so. The first half of the discussion did not deal with apparent authority at all, but spoke of representation and mandate in general.<sup>116</sup> Part of this discussion revolved around Louisiana Civil

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authority. See also Implied Authority, Black's Law Dictionary 128 (7th ed. 1999).

113. Brief of Petitioner-Appellant at 3–4, *Holloway v. Shelter Mut. Ins. Agency*, No. 03-0896 (3d Cir. Dec. 10, 2003).

114. *Id.* at 4.

115. Louisiana Law Institute, Minutes of the Meeting of the Council, p. 12 (Sept. 15–16, 1995). While in committee it was "Art. 6: Putative Mandatary."

116. *Holloway v. Shelter Mut. Ins. Co.*, 03-0896 (La. App. 3d Cir. 12/10/03), 861 So. 2d 763, 765–69, *writ denied*, 04-0087 (La. 3/19/04), 869 So. 2d 854. The court reproduced Louisiana Revised Statutes § 22:1406(D)(1)(a), which required the waiver be signed by the insured or his legal representative. The discussion then turned to whether Mrs. Holloway was Donnie Holloway's valid legal representative. The third circuit discussed Louisiana Civil Code article 2985, which defines representation; Louisiana Civil Code article 2986, which gives the means of conferring authority; and Louisiana Civil Code article 2987,

Code article 2993, but only a very small part.<sup>117</sup> This case presented the third circuit a perfect opportunity to apply the new "equal dignities" article, and although the court did mention it, it gave the doctrine very brief treatment.<sup>118</sup> The court then moved into the controversial part of the decision, apparent authority. One reason for such controversy is that this discussion was unnecessary. Not only unnecessary, but contradictory to a well-developed and important doctrine in Louisiana law. Plaintiff's counsel did not address the revision or apparent authority in his appellate brief, and the case should have been decided based on Louisiana Civil Code article 2993 alone, thus the entire discussion was at the initiative of the court.<sup>119</sup>

The third circuit conceded that apparent authority has been well-developed and is an important doctrine in Louisiana. It then stressed, "there is no express codal or statutory authority for the doctrine of apparent authority in Louisiana."<sup>120</sup> The court was able to recognize and discuss several new Title XV articles, but apparently not all of them.<sup>121</sup> The same act that created the other Title XV articles also enacted Louisiana Civil Code article 3021, yet the third circuit ignored this article completely.<sup>122</sup> By ignoring this article the court inferred its belief that the article did not apply, or exposed an oversight of its existence. Either would be error in a post-revision discussion of apparent authority. The third circuit in *Holloway* referenced 1997 La. Acts, No. 261 not as the codification of apparent authority, but as the possible demise of the doctrine. Because the supreme court has not "instructed the courts of this state as to whether the apparent authority doctrine of agency continues," the third circuit questioned the continuation of the doctrine.<sup>123</sup> The *Holloway* court did not expressly deny the existence of the apparent authority doctrine, but said a current

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which defines procuration (one of the methods of conferring authority). The third circuit then addressed each of the methods through which authority may be conferred under Louisiana Civil Code article 2986: law, contract of mandate or partnership, and procuration. Each of these is rebutted in kind by citing La. Civ. Code art. 2993.

117. *Holloway*, 861 So. 2d at 765-69.

118. *Id.* at 769.

119. Brief of Petitioner-Appellant, *Holloway v. Shelter Mut. Ins. Agency*, No. 03-0896 (3d Cir. Dec. 10, 2003).

120. *Holloway*, 861 So. 2d at 769.

121. *Id.* at 766-69.

122. *Id.*; 1997 La. Acts, No. 261, § 1.

123. *Holloway*, 861 So. 2d at 770.

reading of the post-revision articles of mandate, “precludes the application of the apparent authority doctrine” and they “do not conclude that resort to the principle of apparent authority is appropriate in this case.”<sup>124</sup> This leaves one to wonder if this preclusion is case-specific, or will carry over. Indeed, if the third circuit suddenly does not recognize apparent authority after codification of the doctrine, despite post-revision recognition in other cases, one can only suppose the true status of apparent authority within the third circuit.<sup>125</sup>

### *C. Article 2993: The Right Result for the Right Reason*

A possible reason for the court’s discussion of apparent authority is that notions of equity may have compelled a finding for the plaintiff. The suit comprised three siblings who had recently lost their father, one a minor, against a large insurance provider.<sup>126</sup> Denying insurance proceeds to a dead man’s children is not a popular or comfortable decision. Any concerns about such a result were unnecessary as the revision provided ample grounds to find for the plaintiffs.

The supreme court introduced the “equal dignities” doctrine in *Tedesco*, which was codified in the 1997 revision, and is now represented in Louisiana Civil Code article 2993.<sup>127</sup> The *Holloway* court cited the relevant statute requiring a waiver of insurance be signed by the insured or his legal representative.<sup>128</sup> Although the contract of mandate need not be in any form it must at least take the form of the requested act, which in *Holloway* was a writing. The mandate in *Holloway* was not written, rather spoken, therefore no authority existed, actual or apparent, and further discussion of either was unnecessary.<sup>129</sup>

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124. *Id.*

125. See *Venable v. U.S. Fire Ins. Co.*, 02-505 (La. App. 3d Cir. 10/30/02), 829 So. 2d 1179, and *F. Miller & Sons, Inc. v. Calcasieu Parish Sch. Bd.*, 02-00016 (La. App. 3d Cir. 5/15/02), 817 So. 2d 1261, 1264 (post-revision third circuit cases recognizing apparent authority).

126. Plaintiff’s Petition for Damages at ¶ 1, *Holloway v. Shelter Mut. Ins. Co.*, 208,057 (9th Judicial District, Parish of Rapides).

127. *Tedesco v. Gentry Dev., Inc.*, 540 So. 2d at 962 (La. 1989); 1997 La. Acts, No. 261 § 1.

128. *Holloway*, 861 So. 2d at 766.

129. After concluding the UM insurance waiver was ineffective under Louisiana Civil Code article 2993, one glaring question remained. What about the rest of the policy? Louisiana Revised Statutes § 22:1406(D)(1)(a) requires that the selection of economic-only insurance be done by signature. If there

While seizing the opportunity to discuss apparent authority the third circuit may as well have discussed agency by estoppel. Louisiana Civil Code article 2993 precludes conferring of actual and apparent authority verbally when the act to be performed requires a writing. But it does not preclude an agency by estoppel claim.<sup>130</sup> Being altogether different from apparent authority, agency by estoppel is a tort doctrine unaffected by the revision on mandate, and will withstand the equal dignities requirement of Louisiana Civil Code article 2993. What it does require is a change of position. The premiums that Shelter Insurance would have collected for the UM coverage were forfeited by their reliance on Donnie Holloway's manifestations. At the very least any award for the plaintiffs should be reduced by, with interest, the total of the premium payments foregone by Shelter Insurance.

The *Holloway* case represents confusion and controversy among jurisprudence applying apparent authority. While the correct result may have been reached, the case was not correctly decided. The third circuit embarked on a needless discussion that at best created much confusion about the status of apparent authority, and at worst entirely discarded the doctrine within the third circuit.

#### IV. A CASE FOR CLARITY

Apparent authority is necessary. This is something our State's courts realized long before the legislature, or the Louisiana Law Institute. Faced with choosing between law according to justice, or justice according to the law, Louisiana courts have chosen the former and Louisiana law has been better for it. Indeed it seems that our civilian courts have created law, only to have the legislature later ratify it. Louisianans are not so proud as to let tradition get in the way of good law. Now that Louisiana has good law, both in cases and the Civil Code, some steps should be taken to clarify it.

There are two possible ways to clarify this, and the first is jurisprudential. Most appellate courts will be hesitant to proclaim the exact judicial interpretation of the new Louisiana Civil Code

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were no authority to waive the UM coverage, did Mrs. Holloway have authority to execute insurance documents at all? This question was not weighed by the court because this case was on appeal only with regards to the summary judgment dismissal.

130. *Tedesco*, 540 So. 2d at 964.

article 3021, so the most conclusive judicial remedy is for the Louisiana Supreme Court to grant writs in an apparent authority case and explain the status of the doctrine post-revision. This would directly address the contention of the third circuit.<sup>131</sup>

The other way would be to amend the comments to Louisiana Civil Code article 3021 to specify that the article codifies "apparent agency." Although judicial interpretation is left to courts, and legislators may be reluctant to include many comments because they can narrow or complicate articles, a simple acknowledgment that Louisiana Civil Code article 3021 provides for "apparent agency" should not be too restrictive. And while comments are not binding law, they are in place to offer guidance, and guidance is definitely needed here. Further, if the supreme court explains the revision in a case, that explanation will make an appropriate addition to comments following the article, and the two coupled together could provide exactly what is needed to end the longstanding ambiguity surrounding the apparent authority doctrine.

## V. CONCLUSION

Apparent authority lives on. Although the third circuit refused to recognize the codification of the doctrine, and questioned the doctrine's post-revision continuity, this is the only example of such a dismissal. The discussion of apparent authority in *Holloway* would have ultimately had no effect on the outcome on the case.

Despite taking a serious blow from the third circuit, apparent authority survived the *Holloway* case. The legislative intent, a new code article, and established, continuing jurisprudence recognizing apparent authority all warrant this conclusion. Apparent authority is now clothed in civilian terms as *Putative Mandate*, and is more a part of Louisiana law now than it has been for all of its existence. Despite its apparent demise.

*Bendel Lee Carr Jr.\**

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131. See discussion of the third circuit's contention of no Louisiana Supreme Court guidance, *supra* Part III.B.

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